

IBRAHEEM O. ODUNSI and	:	SUPERIOR COURT OF NEW JERSEY
AGBENU OGENYI, Per Quod	:	LAW DIVISION
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	:	
Plaintiff,	:	
	:	
	:	ESSEX COUNTY
v.	:	DOCKET NO.: L-006746-19
	:	
	:	
MARYANN COONEY,	:	
EDWARD M. COONEY, JR.,	:	
JOHN DOES 1 – 10, ABC CORPS. 1 – 10	:	
	:	
	:	
	:	<b>OPINION</b>
	:	
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	:	
Defendants.	:	

The following attorneys are counsel of record:

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By: The Honorable Thomas R. Vena, J.S.C.

### **Preliminary Statement**

This matter is before the Court on the motion for summary judgment by Defendant Mary Ann Cooney (“Defendant” or “Cooney”). Plaintiffs Ibraheem O. Odunsi (“Odunsi”) and Agbenu Ogenyi (“Ogenyi”) (collectively, “Plaintiffs”) have filed a cross-motion for summary judgment in response to Defendant’s motion. Defendant has filed a brief in response to the cross-motion.

Defendant argues three main points in support of her motion for summary judgment: that (1) the personal injury protection available to Plaintiff through Uber is not sufficient personal injury protection coverage as required under N.J.S.A. 39:6A-4 and 39:6A-4.5; (2) Plaintiff’s claims are barred pursuant to N.J.S.A. 39:6A-4.5(a) for failure to maintain medical expense benefits as mandated by New Jersey Law; and (3) The Deemer Statute does not apply to provide personal injury protection to Plaintiff because at the time of the accident, Plaintiff was a New Jersey resident, had his vehicle registered and principally garaged in New Jersey, and was uninsured.

Plaintiffs argue four main points in support of their cross-motion for summary judgment and in opposition to Defendant’s motion for summary judgment: that (1) the statutory bar to a culpably uninsured operator of an automobile is inapplicable since Plaintiff’s vehicle was not an “automobile” required to comply with N.J.S.A. 39:6A-4; (2) Defendant’s statutory bar defense has been waived for Defendant’s failure to plead the defense; (3) Defendant’s statutory bar defense must be stricken and Defendant barred from raising the defense at trial by the equitable doctrines of unclean hands, waiver, estoppel, and laches, inasmuch as Plaintiff has been severely prejudiced by Defendant’s delay in raising the defense; and (4) Defendant’s motion must be denied since there are

genuine issues of material fact as to the applicability of the statutory bar defense and Plaintiffs' cross motion should be granted since there are no genuine issues of material fact as to whether the Defense is either inapplicable or has been waived.

### **Findings of Fact**

This matter arises from a car accident that occurred on November 6, 2018 when Defendant crashed into the rear of Odunsi's vehicle. Odunsi filed this Complaint alleging negligence against the operator and owner of the vehicle that rear-ended his vehicle and Plaintiff Ogenyi was added as a plaintiff when Odunsi filed his First Amended Complaint adding a per quod claim.

A police report was prepared at the scene of the accident. Plaintiff's insurance policy number was written in Box 24 on the report. The same policy number appears in Plaintiff's "Personal Auto Declaration."

In one of her answers to interrogatories, Defendant attached a document titled "Claimant's Report of Automobile Accident completed by plaintiff on November 26, 2018." It lists Odunsi's employer as "Uber" and his occupation as "Uber Driver."

### **Conclusions of Law**

#### **A. Summary Judgment Standard**

This is a motion for summary judgment pursuant to R. 4:46-2(c). Under the rule, a court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled

to a judgment or order as a matter of law.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529, 666 A.2d 146 (1995).

A genuine issue of material fact is present when the evidence on the motion record, considered in light of the applicable burden of persuasion at trial and in a manner most favorable to the non-movant, would allow a fact-finder to resolve the dispute in favor of the non-movant. Id. at 540. In order to ensure that the evidence on motion is viewed in a manner most favorable to the non-movant, the Court is compelled to accept the non-movant’s version of the facts as true and grant the non-movant “[t]he benefit of all inferences that those facts support.” Baird v. Am. Med. Optics, 155 N.J. 54, 58, 713 A.2d 1019 (1998).

At the same time, the non-moving party “cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.” Brill, 142 N.J. at 529. In other words, while “genuine” issues of material fact preclude the granting of summary judgment, facts which are “of an insubstantial nature” will not prevent courts from granting the same. Id. at 530. Thus, the relevant inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986)).

## **B. New Jersey’s No-Fault System of Automobile Insurance**

Under New Jersey’s system of no-fault automobile insurance, owners of motor vehicles registered or principally garaged in New Jersey have certain legal obligations. First, they must purchase standard, basic, or special insurance coverage for their automobiles. N.J.S.A. 39:6B-1; see also, Caviglia v. Royal Tours of Am., 178 N.J. 460, 466, 842 A.2d 125 (2004). Second, every automobile insurance policy must provide

"personal injury protection (PIP) benefits" – the payment of medical expenses to the insured and his family household members who suffer bodily injury in an automobile accident. See N.J.S.A. 39:6A-4, -3.1(a), -3.3(b)(1); see also, Caviglia, 178 N.J. at 466. Those medical benefits are paid without regard to who caused the accident, giving rise to the moniker "no-fault" insurance. Caviglia, 178 N.J. at 466; see also N.J.S.A. 39:6A-4. Third, New Jersey policyholders – in exchange for lower premium payments--have the option of selecting the limitation-on-lawsuit threshold, which restricts their right to sue for "noneconomic loss" if injured in an accident. DiProspero v. Penn, 183 N.J. 477, 480-81 & n. 1, 874 A.2d 1039 (2005); see also, N.J.S.A. 39:6A-8(a).

Those covered by the limitation-on-lawsuit threshold may not sue a tortfeasor for noneconomic damages unless they suffer a serious or permanent bodily injury, as defined in N.J.S.A. 39:6A-8(a) (identifying six categories of injuries that vault limitation-on-lawsuit threshold). DiProspero, supra, 183 N.J. at 481, 497-98. Significantly, a New Jersey policyholder who chooses the lawsuit threshold may nonetheless sue for noneconomic damages if the tortfeasor is not a participant in this State's no-fault system and therefore is not insured for PIP benefits. See N.J.S.A. 39:6A-8(a).

N.J.S.A. 17:28-1.4, known as the "Deemer Statute," provides benefits and burdens to out-of-state drivers insured by companies authorized to do business in New Jersey. Such out-of-state drivers, like New Jersey policyholders, receive PIP benefits on a no-fault basis under N.J.S.A. 39:6A-4; however, they are subject to the limitation-on-lawsuit threshold, as defined in N.J.S.A. 39:6A-8(a). The statute was enacted in 1985 as part of the State's "no fault automobile insurance plan" and "in response to a growing number of cases where New Jersey residents were injured in accidents caused by out-of-state drivers whose insurance coverage was less than New Jersey's statutory requirements."

Leggette v. Government Emples. Ins. Co., 450 N.J. Super. 261, 265, 161 A.3d 769 (App. Div. 2017) (quoting Government Emples. Ins. Co. v. Allstate Ins. Co., 358 N.J. Super. 555, 560, 818 A.2d 474 (App. Div. 2003)).

### **Substantive Analysis**

The issue before this Court is whether Plaintiff was required to maintain PIP insurance for the subject automobile as is required by New Jersey law. However, other questions relating to this issue must be answered before the ultimate question can be answered.

The proper starting point is for this Court to determine whether Defendant's automobile, which was being used as a carrier for public transportation at the time of the subject accident, fits within the definition of "automobile" as defined by N.J.S.A. 39:6A-2a. That statute reads in pertinent part: "[a]utomobile' means a private automobile or station wagon type that is owned or hired and is neither used as a public livery conveyance for passengers nor rented to others with a driver . . . ." N.J.S.A. 39:6A-2a. While the statute itself first categorizes the vehicle and then describes the vehicle's covered usage, it does not define "public or livery conveyance." Our Courts have had the opportunity to opine on this issue, quoting at times to Black's Law Dictionary, which defines "livery conveyance" as "a vehicle used indiscriminately in conveying the public, without limitation to certain persons or particular occasions or without being governed by specific terms." See CSC Ins. Serv. v. Graves, 293 N.J. Super. 244, 250-251 (Law. Div. 1996) (quoting Black's Law Dictionary, 935 (6th. Ed. 1990)). Our Appellate Division has further opined on what aspects of a motor vehicle control its classification under the

statute. In finding that our Legislature did not intend that a vehicle's use at the time of an accident controls its classification, the Court stated:

The motor vehicle's classification as a public or livery conveyance for passengers does not change by its temporary or transitory use for some other purpose. Rather, the motor vehicle's general status controls its classification. Had the Legislature intended that the motor vehicle's use at the precise time of the accident controlled its classification, it is reasonable to conclude that the Legislature would have included language to that effect in the Act. The Legislature did not include such language and in our view it is clear that the Legislature did not intend to do so."

Bello v. Hurley Limousines, 249 N.J. Super. 31 (App. Div. 1991). Plaintiffs contend in their moving papers that there is a "consensus of factual contentions" that the vehicle Plaintiff was operating on the date of the accident was used for public transportation" as Plaintiff Odunsi was an Uber driver. While this is true, it is this Court's opinion that such a temporal description of the use of the vehicle as such is insufficient to categorize it under the statute without inquiring as to the 'general status' of the vehicle. In the case at bar, the vehicle used by Plaintiff both at the time of the accident and otherwise is properly categorized as a private passenger vehicle. A distinction is to be drawn between the status of private vehicles used occasionally for purposes of 'public conveyance' and the status of vehicles that are solely or, at least primarily used for public conveyance. For instance, a limousine or taxicab is covered under the statute because it is used for public or livery conveyance for passengers or is rented to others with drivers. Thus, such vehicles are not required to maintain sufficient PIP coverage under the statute. What is distinguishable between vehicles of this nature and Plaintiff's vehicle is that these vehicles are chiefly used, if not used solely for, the purpose of public conveyance. In other words, these vehicles are held out to the general public for carrying passengers for hire. Plaintiff's

vehicle is different because Plaintiff holds full autonomy over his vehicle. The vehicle is not held out to the general public in the same way a limousine or public transit bus is. Plaintiff may choose to work for Uber each and every day for eight hours, or he may choose to use his vehicle for personal and private use without holding it out to the public for an indefinite period of time. Moreover, Uber, through its policy, provided medical coverage as Plaintiff was “on duty” at the time of the subject accident. However, this Court agrees with Defendants that such coverage is insufficient under N.J.S.A. 39:6A-4 and -4.5. The Uber policy only provides limited medical payment benefits available in specific circumstances. Thus, the ‘general status’ of Plaintiff’s vehicle is that of a private passenger vehicle subject to the statute. The temporary usage of the vehicle for public conveyance, even at the time of the accident, is insufficient for purposes of the No Fault Act to exempt it from maintaining sufficient PIP coverage.

Having found that Plaintiff’s vehicle is a covered automobile and thus covered under the No Fault Act requiring him to maintain sufficient PIP coverage, this Court must now answer whether the vehicle was “principally garaged” in New Jersey, such that it can be reached by the statute.

This Court finds that Plaintiff’s vehicle was principally garaged in New Jersey and thus subject to the No Fault Act. Plaintiff was a New Jersey resident and employed in New Jersey and owned the vehicle that is the subject of this accident, which was registered in New Jersey. The record shows that Plaintiff’s vehicle was primarily kept (or “principally garaged”) in New Jersey but insured the vehicle under a policy issued by Infinity Insurance Company (“Infinity”) in Texas.

Additionally, the Deemer Statute does not apply here to protect Plaintiff because it has already been held that Plaintiff is not exempt from maintaining PIP coverage under



the statute. Even if he were exempt, Infinity is not an admitted insurance company “authorized to transact or transacting automobile or motor vehicle insurance business in this State.” N.J.S.A. 17:28-1.4. Plaintiff was required to have sufficient PIP coverage in New Jersey, and he did not maintain such coverage.

Finally, Plaintiffs’ arguments as to why this Court should bar Defendants from pleading the statutory bar are unavailing. New Jersey is a notice pleading state and the No Fault Act does not require that such a defense be plead with specificity. In both her Answer and Amended Answer, Defendant stated as Separate Defense No. 4: “The Complaint fails to state a cause of action upon which relief may be granted, and these defendants reserve the right to move for a dismissal of this Complaint on this ground.” Additionally, whether Plaintiff Odunsi properly maintained sufficient PIP coverage under the statute was not a fact available to Defendant prior to engaging in discovery. Such a fact was unavailable to Defendants prior to proper discovery. Thus, the argument that this defense was waived by Defendants is unconvincing. In addition, this Court disagrees with Plaintiffs that flying to New Jersey for a medical examination equates to undue prejudice sufficient to invoke the equitable doctrines of estoppel or laches. Furthermore, no facts or arguments made on the record convince this Court that the doctrine of unclean hands is applicable here.

### **Conclusion**

For the foregoing reasons, authority cited, having reviewed the pre and post hearing briefs, considered the testimony of and credibility of the witnesses presented, and argument of counsel, the Motion for Summary Judgment by Defendant is GRANTED, and the Cross Motion for Summary Judgment by Plaintiff is DENIED.

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Thomas R. Vena, J.S.C.